Supreme Court, U.S.
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No. 85-2046

In The Supreme Court of the United States

October Term, 1985

LENORD S. HORWITZ, D.P.M.,

Appellant,

vs.

THE STATE BOARD OF MEDICAL EXAMINERS OF THE STATE OF COLORADO and THE PEOPLE OF THE STATE OF COLORADO, ex rel. DUANE WOODARD, Attorney General,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF COLORADO

REPLY TO MOTION TO DISMISS

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25 PP

QUESTIONS PRESENTED

1. Can the unsworn, *ex parte,* undocumented and uncorroborated statement of one witness constitute a reasonable ground upon which a finding of emergency can be made by a state regulatory agency where the licensee is given no prior notice of said statement or opportunity to rebut the same?

2. Does a finding based upon an *ex parte,* undocumented and uncorroborated statement of a single witness obviate the due process requirement to provide pre-suspension notice and opportunity to be heard?

3. Does due process require the termination of a summary suspension after the agency Hearing Officer finds and determines, following an evidentiary hearing on the merits, that the suspended licensee committed none of the acts complained of by the witness and upon which the Summary Suspension Order was based?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iii
INTRODUCTORY STATEMENT	1
STATEMENT REGARDING FACTS	1
ARGUMENT	4
CONCLUSION	7
APPENDIX 1	App. 1
APPENDIX 2	App. 4
APPENDIX 3	App. 5
APPENDIX 4	App. 8
APPENDIX 5	App. 12

TABLE OF AUTHORITIES

Page

CASES

Barry v. Barchi, 443 U.S. 55, 61 L.Ed.2d 365, 99 S.Ct. 2642 (1979) 5

Garvey v. Freeman, 397 F.2d 600 (10th Cir. 1968) 6

STATUTES, RULES AND REGULATIONS

C.R.S. 24-4-106 5

INTRODUCTORY STATEMENT

The Appellees in this matter have moved to dismiss the appeal filed herein for lack of a substantial federal question. It is submitted that the power of a state licensing board to suspend a professional licensee's license to practice, without prior notice or hearing, based upon the unsworn testimony of a single witness and a continuation of said suspension after the licensee has been acquitted on the merits present substantial federal questions under the Fourteenth Amendment to the United States Constitution, upon which this Court has not ruled in many years and over which this Court should note probable jurisdiction.

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STATEMENT REGARDING FACTS

The Appellees have misstated to this Court certain facts which may be "crucial to a proper understanding of this Appeal."

First of all, a written Order of Summary Suspension was executed by the Board on December 21, 1983 (not 1984 as stated in Appellees' Motion to Dismiss), but the actual order had been voted and approved by the Board on December *1,* 1983, twenty days earlier, conditioned upon the Board's receipt of a written report from Dr. Stephen Albert. The minutes of the Board's meeting of December 1, 1983 are attached hereto as Appendix 1, page App. 1, *infra.* The facts, if any, upon which the Board based its "finding" that an emergency existed, were therefore known to the Board on December 1, 1983, approximately one hour before Dr. Horwitz personally appeared before the Board. The

Written Order of Summary Suspension may have followed the receipt by the Board of Dr. Albert's *written* report but the actual issuance of the Order occurred on December 1, 1983, following receipt of Dr. Albert's *verbal* report. These facts are contrary to the assertion of Appellees' Counsel at page 2 of Appellees' Motion to Dismiss.

Therefore, the Board had ample opportunity to advise Appellant of the substance of Dr. Albert's report and of the Board's perception that an emergency existed, and to give Appellant his statutory and constitutional right to address the same but deliberately chose not to do so.

Secondly, Appellees have misstated the facts concerning the transmission to Appellant of Dr. Albert's written report. It was already stated that the Board concealed Dr. Albert's verbal report from Appellant, despite Appellant's physical appearance before the Board right after Dr. Albert gave his verbal report. As is shown in the letter from Appellees' Counsel to Appellant's Counsel reprinted in Appendix 2 hereto, page App. 4, *infra,* the written report of Dr. Albert was not mailed to Appellant until December 28, 1983 (received by Appellant's counsel on December 30, 1983), one week *after* the Board entered its written Order of Summary Suspension and not "at or about the same time it was delivered to the Board" as alleged on Page 2 of Appellees' Motion to Dismiss. Accordingly, Dr. Horwitz had no opportunity to address the issues raised in said report (reprinted as Appendix 3, page App. 5, *infra*) until after the Board had suspended his license to practice. It is submitted that Counsel for Appellees has a copy of said letter in his files but apparently chose to disregard the same.

With regard to the contents of Dr. Albert's written report, it should be noted that said report, Appendix 3, *infra*, contains factual allegations relating to six patients. None of said allegations were proven at the hearing, as shown in the Initial Decision, Appendix G to Appellant's Jurisdictional Statement.

Furthermore, it is submitted that if there was a life-threatening or health-threatening emergency created by Dr. Horwitz' practice of podiatry, such emergency must have existed, if at all, on December 1, 1983 when the Board voted to summarily suspend Appellant's license to practice. Yet the Board waited twenty days from learning of said "emergency" before formally instituting a summary suspension, and waited an additional week before even notifying the Appellant's Counsel that a report had been issued which accused Appellant of gross negligence. During that four-week period, the Board could have given Dr. Horwitz his due process rights but obviously declined to do so. To imply that Appellant may have had some opportunity to address the allegations of Dr. Albert's report or of the Order of Summary Suspension prior to its institution is to belie the facts.

It is true that Appellees did not request any additional time to take any action. It is also true that Appellees did not act in a manner to expedite the proceedings. It should be noted that Counsel for Appellees represented in Open Court on February 7, 1984, that they would stipulate to the filing of exceptions to the Initial Decision in less than the statutorily-allowed thirty day period, yet in fact took the entire thirty days to file their exceptions, during which entire time Appellant remained under suspension. The Board then waited thirty-five days before holding a hearing and

waited an additional seventeen days before issuing a final decision. It is submitted that in light of the favorable findings by the Hearing Officer, this sequence of events constitutes unreasonable delay and can hardly be called "prompt."

Finally, Appellant filed actions in the Denver District Court, the Colorado Court of Appeals, the Colorado Supreme Court and the United States District Court for the District of Colorado to obtain relief from the Order of Summary Suspension (Appendix 4, *infra,* page App. 8). Appellees' statement on page 3 of their Motion to Dismiss that "by agreement, the court order remained effective until May 11, 1984" is therefore another blatant misstatement.

ARGUMENT

As was noted above, Appellant was provided with neither notice nor opportunity to respond to the allegations contained in the Order of Summary Suspension or the Report of Dr. Albert on which said Order was based until *after* the Order was issued.

Appellant is not asking this Court to exercise "20/20 hindsight" in this case. Rather, Appellant submits that Dr. Albert's report was insufficient as a basis for the Board's finding of emergency as a matter of law, in light of the following:

a. Dr. Albert's report was undocumented and unsworn.

b. Dr. Horwitz was not given the opportunity to introduce the Board to an independent witness, Dr.

Robert Timm, who witnessed the surgeries on patients R.O. and R.W. (Appellant's Jurisdictional Statement, page App. 49, paragraph 26 and page App. 52, paragraph 33). Dr. Albert failed to disclose Dr. Timm's existence or participation in his report.

c. Appellant was not given the opportunity to explain to the Board his record-keeping practices which explanation led the Hearing Officer to conclude that the notes on which Dr. Albert based his report were not final (Appellant's Jurisdictional Statement, page App. 56, paragraph 6).

Appellees' position seems to be that just because the Board said there was an emergency, based upon what they had been told by Dr. Albert, this is sufficient to enable the Board to institute a summary suspension [citing *Barry v. Barchi,* 443 U.S. 55, 61 L.Ed.2d 365, 99 S.Ct. 2642 (1979)]. The fallacy in this argument is two-fold: (i) the licensee in *Barchi, supra,* unlike Dr. Horwitz, was given the opportunity to present his side of the story on two occasions before he was suspended, and (ii) a "finding" must require something more than merely stating that a set of facts exists based upon *ex parte* evidence. Under the Colorado Administrative Procedures Act, C.R.S. 24-4-106, agency findings are allowed to stand unless clearly erroneous or unsupported by substantial evidence when the record is considered as a whole. (Appendix 5, page App. 12, *infra*). It is submitted that the unsworn statement of one witness whom Appellant had no opportunity to cross examine is not even evidence, much less substantial evidence. Therefore, the Board's finding, made without any evidentiary or quasi-evidentiary hearing, was improper and would not support the imposition of a summary suspension.

Upon the institution of the summary suspension, Appellant was absolutely deprived of his right to practice his

chosen profession. The Board's perception of the safety or danger to the public of Appellant's continued practice, where such perception is based upon gossip and innuendo, cannot outweigh Appellant's interest in continuing to earn his livelihood. Appellant was denied the opportunity to present, prior to his suspension, evidence which would have either vindicated him or at least shown to the Board that the report of its supervisor was substantially in error. Since Appellant could not be suspended with pay, as noted by Appellees, the appropriate action of the Board should not have been to suspend Appellant without pay but rather, the Board should not have suspended him at all until a hearing of some type could be held.

The insult added to the injury was forcing Appellant to endure continued suspension until May 11, 1984, after it was found by the Hearing Officer on February 6, 1984 that the facts on which the Summary Suspension was based were not proven. The Board's failure to reinstate Appellant in order to allow the administrative process to run its course caused the Appellant to remain under suspension, arbitrarily and unlawfully, for more than ninety days following the issuance of the initial Decision. This violates substantive due process of law. *Garvey v. Freeman*, 397 F.2d 600 (10th Cir. 1968).

———o———

CONCLUSION

The Board did not act in the face of any "emergent threat to the public." The Board acted based upon rumor, and deliberately chose not to take such steps as would enable the Board to learn the facts. Notice of the Summary Suspension was not given to Appellant even though Appellant appeared before the Board on the very day that the Suspension was ordered. Even the report on which the suspension was based was not provided to Appellant or his counsel in time to enable Appellant to respond to the same prior to the institution of the suspension. Appellant sought in every available forum to vacate the Order of Summary Suspension but was unsuccessful. Appellees protracted these proceedings, opposed Appellant at every turn, and now ask this Court to hold that it is *Appellant's* fault that he was under suspension for four months. Appellees' argument is that if Appellant had acted differently, he may have been unlawfully suspended for only two or three months. It is suggested that the arrogance of such argument is apparent.

FOR THE FOREGOING REASONS, it is prayed that Appellees' Motion to Dismiss be denied and that the Court note probable jurisdiction of this Appeal.

Respectfully submitted,

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APPENDIX 1

Dr. Stephen Albert, D.P.M.

12/1/83

Dr. Albert, who is supervising the practice of Dr. Horwitz, appeared before the Panel and was introduced to the board members.

There have been some problems in working out schedules for observation between Dr. Albert and Dr. Horwitz.

Dr. Albert reported that he is available to observe on Tuesdays, Wednesdays (every other Wednesday) and Fridays. Dr. Horwitz's office is not opened on Fridays. Dr. Horwitz is in only half a day on Tuesdays. Dr. Albert requested Dr. Horwitz to group cases, since he is on the east side of town and Dr. Horwitz's office is on the west side. Dr. Horwitz does a certain amount of cases on the spot. He is also taking a very long time on each observation. As an example, to administer a local anesthetic and do a prep, takes an hour. Dr. Albert feels that his time is being wasted. When Dr. Albert calls to find out about scheduling, Dr. Horwitz often switches time to do procedures. Monday his office was closed (probably because of the storm), called back on Tuesday and he was in progress on a surgery. Wednesday to Friday, Dr. Albert was out of town. Dr. Horwitz had moved up his cases on Wednesday.

When Dr. Albert was asked if Dr. Horwitz's quality of work meets the standard of podiatry care, he replied that it does not.

Dr. Albert relayed information about a white female. X-rays had been taken with the proper position. Dr. Horwitz ignored this. He did another procedure for which he

did not have consent. Dr. Albert asked him why he was doing that and asked him for some documentation. Dr. Horwitz has not provided the documentation.

Dr. Albert observed Dr. Horwitz using a contaminated cotton swab on a post-op patient. A salt agar plate which he had used in the morning, was not stored properly. Dr. Horwitz had difficulty with one of his burrs while working on a patient. He then used a non-sterile burr.

Dr. Albert was asked if this was a standard technique. Dr. Albert replied this was very poor.

Dr. Albert had recommended certain forms be used for record keeping. Dr. Horwitz did a surgery without getting information on medical history or medications taken, even though the recommended form was used. Dr. Albert discovered the patient had an MI and was on inderol, which were not shown on the chart.

Dr. Albert considers what Dr. Horwitz is doing to be grossly negligent.

Dr. Albert was asked if he thinks Dr. Horwitz's practice is a danger to the health, safety or welfare of the public. He replied that it is.

Dr. Albert said he will obtain patients' records and charts and provide a written report for the Board's attorneys.

Dr. Lenord Horwitz and Mr. Hochstadt

Later in the meeting Dr. Horwitz appeared before the Panel with his attorney, Mr. Hochstadt, and they were introduced to the board members.

Since there appears to be problems about scheduling observations with Dr. Albert, the Board wanted a chance to hear from them about the days surgery is scheduled.

Mr. Hochstadt informed the Panel the reason Dr. Horwitz's office is closed on Friday is because he is a practicing, Orthodox Jew.

When they were told Dr. Albert has Tuesdays and every other Wednesday available, Dr. Horwitz replied that it was not feasible to schedule three surgical procedures in one morning. Two is what he normally does. He said he would schedule surgeries Wednesday morning or afternoon, or whatever time is convenient for Dr. Albert.

Dr. Horwitz and Mr. Hochstadt were thanked for appearing.

MOTION

A motion was made, seconded and carried to have the Attorney General's office prepare and file a Complaint and Order for Summary Suspension for Dr. Horwitz, on receipt of the written report of Dr. Albert, if that report confirms his oral statements to the Panel.

APPENDIX 2

(SEAL)

THE STATE OF COLORADO

DEPARTMENT OF LAW
OFFICE OF THE ATTORNEY GENERAL

Duane Woodard
Attorney General
Charles B. Howe
Deputy Attorney General
Richard H. Forman
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December 28, 1983

Jordan Hochstadt, Esq.
Hochstadt, Straw & Strauss, P.C.
2043 York Street
Denver, Colorado 80205

RE: People v. Horwitz

Dear Mr. Hochstadt:

Enclosed please find a copy of the report from Dr. Albert dated December 12, 1983. As I told you earlier, I understood that Dr. Albert was to send this report to you on Monday, December 19, 1983. I do not know why it did not reach you earlier.

Very truly yours,

/s/ Thomas J. Lyons
Assistant Attorney General
Regulatory Law Section

TJL/mjb
Encl.

APPENDIX 3

Stephen F. Albert, D.P.M.
Board Certified: Diplomate, American Board of Podiatric Surgery
Diplomate, American Board of Podiatric Orthopedics

Specialist of Diseases, Injury & Surgery of the Foot

12/12/83

Colorado State Board of Medical Examiners,
Inquiry Panel A.
c/o Ray E. Piper, D.O.
1525 Sherman St., 3rd Floor
Denver, Colorado 80203

Dear Dr. Piper:

Pursuant to the Stipulation and Order between Inquiry Panel A of the State Board of Medical Examiners and Lenord S. Horwitz, D.P.M., I submit the following written report.

I met with Dr. Horwitz at his office on November 15th, 16th and 23rd and December 7th, for surgical observation and medical record review. My findings are summarized in a separate document accompanying this letter.

In light of the detailed findings, I have decided to no longer participate as supervising podiatrist per the above mentioned stipulation. In my opinion, the accompanying evidence of gross negligence and substandard care, place me at unnecessary risk should their be any future litigation between Dr. Horwitz and these patients.

I am available to the board regarding my findings to date, if it is so desired.

Respectfully Submitted,

Stephen F. Albert, D.P.M.

NOTES REGARDING THE COMPARISON OF MEDICAL RECORDS SUPPLIED BY DR. HORWITZ AND COPIES OBTAINED DURING OBSERVATION

1. V. McC. CHART # 1135
    1. Patient history and registration, no change noted.
    2. Initial visit, altered. Handwritten first line deleted, under typewritten "initial visit" changes in lines one and six, and deleted sentences in line seven or original. [I have copy]
    3. History no change noted.
    4. Informed consent to surgery, altered. Check marks added and witness signature added. [I have copy]

2. M. B. CHART # 1049 Progress note, altered. Changes noted in lines under 11-23-83, original line two "no sign of infection" changed. "WBC" inserted into line five, "arythromycin Rx and increase Uutracef 500 mg." inserted into line nine. Changes noted in lines under 11-29-83, "no sign of infection and swelling due to surgery" inserted into line three and "plate still shows no growth" line five and six.

3. H. R. CHART # 1088 The pre-op AP X-ray with lines drawn is missing from the records. Op report of fourth metartsal and neuroma misstates the facts, progress notes not included with records [I have copy], and pathology report confirms my observation that no neuroma or neurofibrolipoma was excised.

4. R. B. CHART # 1120

    1. Progress notes unchanged.
    2. Informed consent to surgery, altered with check marks added and witness signature added.

5. R. O. CHART # 1018

    1. Patient history and registration includes "coronary heart attack Isodril 4 daily". This was not present when I last reviewed this chart. [I have no copy of this]
    2. History sheet includes "angina Dr. Odom, M.D. 4 Inderal daily" and "10-18-3". [I have copy]
    3. Progress note altered on 9-15-83, I have no recollection of this chart stating "due to heart problem" when I last reviewed it. [I have no copy of this]
    4. Previous patient history appears to be altered. [I have no copy of this]

6. R. W. CHART # 1132 Progress note-initial visit altered, dates don't correspond, changes in phrasing, lines 7, 12, 15, 24, 38. Added "distal exostectomy" along with line 29, and altered copy of repetition of last part of 11-17-83 and 11-23-83 paragraphs.

APPENDIX 4

COLORADO COURT OF APPEALS

No. 84CA0338

LENORD S. HORWITZ, D.P.M.,

Petitioner,

v.

PEOPLE OF THE STATE OF COLORADO, ex rel. DUANE WOODARD, Attorney General; STATE BOARD OF MEDICAL EXAMINERS OF THE STATE OF COLORADO; and DISTRICT COURT IN AND FOR THE CITY AND COUNTY OF DENVER, STATE OF COLORADO (Honorable Clifton Flowers, Judge),

Respondents.

ORDER OF DISMISSAL

On March 16, 1984, this court issued an order requiring petitioner, Lenord S. Horwitz, D.P.M., to show cause why this appeal should not be dismissed without prejudice for lack of a final appealable order. This order to show cause issued following the court's review of the pleadings submitted in connection with petitioner's motion for a stay pending appeal. Petitioner has filed a response to our order to show cause, and the matter has now come on for resolution of the show cause order and consideration of petitioner's motion for stay.

On December 21, 1983, the State Board of Medical Examiners (Board) summarily suspended petitioner's license pursuant to § 24-4-104(4), C.R.S. (1982 Repl. Vol. 10). *See Colorado State Board of Medical Examiners v. District Court,* 191 Colo. 158, 551 P.2d 194 (1976). In accordance with § 24-4-104(4), formal suspension proceedings pursuant to § 12-36-118, C.R.S. (1983 Cum. Supp.),

were promptly initiated. On February 6, 1984, the hearing officer presiding over the suspension proceeding issued a decision which was essentially favorable to petitioner and recommended that petitioner's license to practice medicine be immediately reinstated. Review of the hearing officer's decision by the Board is still pending. Meanwhile, the order of summary suspension remains in effect.

During the pendency of the administrative proceedings, petitioner has twice attempted to obtain relief from the summary suspension by requesting the district court to issue a citation to the Board pursuant to C.R.C.P. 106 (a)(4). Those requests were denied by the district court based on the court's determination that final agency action was lacking. Petitioner also has sought relief in the Supreme Court pursuant to C.A.R. 21, but his petition was denied without opinion.

Admittedly the purpose of petitioners appeal here is to seek relief from the order of summary suspension. In his response to our show cause order, petitioner contends that he has a viable appeal because there is no requirement of final agency action under the circumstances of this case which would preclude judicial review of the summary suspension at this time. He further contends that if final action is required, it has in fact occurred. We disagree with his contentions.

Initially, we note that as a general rule this court's appellate jurisdiction is limited to review of final judgments or orders. Section 13-4-102, C.R.S. (1983 Cum. Supp.); C.A.R. 1. This general rule applies with equal force to review of administrative proceedings. And, this court's initial appellate jurisdiction to review agency or-

ders is limited to review of final agency orders. Section 24-4-106(11), C.R.S. (1982 Repl. Vol. 10). Thus, as is pertinent here, our review of the Board's orders pursuant to the authority granted by § 13-4-102(2), C.R.S. (1983 Cum. Supp.) is limited to review of final orders of the Board. Section 12-36-119(2), C.R.S. (1983 Cum. Supp.). Moreover, appellate review of district court orders arising from judicial review of agency actions presupposes that there is final agency action from which review in the district court may be sought. Section 24-4-106(2) and (4), C.R.S. (1982 Repl. Vol. 10); *See State Personnel Board v. District Court,* 637 P.2d 333 (Colo. 1981).

Accordingly, for this court to have jurisdiction over the instant appeal, there must be a final order of the Board. The order of summary suspension does not constitute a final order since, by the express language of § 24-4-104(4), C.R.S. (1982 Repl. Vol. 10), additional administrative proceedings must be initiated following a summary suspension. Because those proceedings were promptly commenced and are still pending, this court lacks jurisdiction to proceed at this time.

We do acknowledge, however, that the continuing effectiveness of the order of summary suspension pending final review by the Board, which may not occur until April or May of 1984, does impose a severe hardship on petitioner, especially in light of the hearing officer's decision favorable to petitioner. Nevertheless, the lack of a final order of the Board precludes this court's appellate jurisdiction, and this court does not have authority to issue a preemptory writ directed at the order of summary suspension. If any relief from that order is available,

the only mechanism available for obtaining it would appear to be an action in the district court pursuant to C.R.C.P. 106(a)(4), *but cf. State Personnel Board v. District Court, supra,* or the Supreme Court.

Because final agency action is lacking, this appeal is hereby dismissed without prejudice. In addition, since this court's authority to issue a stay pursuant to C.A.R. 8 is conditioned on the existence of a viable appeal, petitioner's motion for a stay of the order of summary suspension pending appeal is hereby denied.

Appeal dismissed.

BY THE COURT: Smith, J.
Tursi, J.
Babcock, J.

Dated: April 6, 1984
cc: Counsel of Record

(SEAL)

APPENDIX 5

24-4-106. Judicial review.

(7) If the court finds no error, it shall affirm the agency action. If it finds that the agency action is arbitrary or capricious, a denial of statutory right, contrary to constitutional right, power, privilege, or immunity, in excess of statutory jurisdiction, authority, purposes, or limitations, not in accord with the procedures or procedural limitations of this article or as otherwise required by law, an abuse or clearly unwarranted exercise of discretion, based upon findings of fact that are clearly erroneous on the whole record, unsupported by substantial evidence when the record is considered as a while, or otherwise contrary to law, then the court shall hold unlawful and set aside the agency action and shall restrain the enforcement of the order or rule under review, compel any agency action to be taken which has been unlawfully withheld or unduly delayed, remand the case for further proceedings, and afford such other relief as may be appropriate. In making the foregoing determinations, the court shall review the whole record or such portions thereof as may be cited by any party. In all cases under review, the court shall determine all questions of law and interpret the statutory and constitutional provisions involved and shall apply such interpretation to the facts duly found or established.